

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN L. DEMING

Claimant

VS.

NATIONAL CO-OP REFINERY ASSOC.

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 201,932

ORDER

Claimant requested review of the February 21, 2005 Post-Award Medical Award by Administrative Law Judge Bruce E. Moore. This is a post-award proceeding for medical benefits. Both parties submitted briefs and the case was placed on the Board's summary docket on March 29, 2005, for decision without oral argument.

APPEARANCES

Andrew L. Oswald, of Hutchinson, Kansas, represents the claimant. Douglas D. Johnson, of Wichita, Kansas, represents respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record listed in the Post-Award Medical Award.

ISSUES

The claimant filed an Application for Post Award Medical on July 19, 2004. He requested a change of physician as well as home nursing care. The Administrative Law Judge (ALJ) ordered respondent to provide a list of three qualified physicians within 75 miles of claimant's home from which the claimant could designate a new authorized treating physician. At the conclusion of the hearing the ALJ directed respondent to

complete installation, within thirty days, of a previously ordered ramp for the front door of claimant's home as well as a bathtub bench. The ALJ however, denied claimant's request for home care as he determined the requested housekeeping services were not medical treatment.

The claimant requests review of whether the ALJ erred in denying him home nursing care. Claimant argues the ALJ had previously ordered home nursing care for his episodic periods of debilitating pain, and that such care should be provided. Claimant also requests that psychiatric treatment be provided.

Respondent argues the ALJ's Post-Award Medical Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the parties' briefs, the Board makes the following findings of fact and conclusions of law:

In a Post-Award Medical Award dated January 17, 2003, the ALJ ordered in part:

Respondent will also designate a medical manager who will be in regular contact with Claimant and who will be responsible for securing skilled nursing services for Claimant for those occasions when Claimant's pain renders him incapable of tending to his own personal needs.¹

However, claimant noted that because of turnover he had been assigned five different case managers after this decision.

Claimant described episodes where his pain increases to the point where he is bedridden. During these episodes claimant testified that he is unable to care for himself or fix meals, and that he can only crawl around and urinate in plastic gallon jugs, which are not emptied for up to a week at a time until he improves enough to get out of bed.

Claimant testified that when he experienced such episodes he called his authorized treating physician's nurse and was told to just try to make himself comfortable, and his medical appointments were rescheduled to get him in to see the doctor as soon as possible. He also testified that when he calls the case manager he is told to contact his physician.

Claimant further testified that although he had requested assistance when he was unable to get out of bed, he was told by his current case manager that in such instances he was to call for an ambulance in order to be transported to the emergency room.

¹ R.H. Trans. (Sept. 8, 2004), Cl. Ex. 4 at 4..

Claimant was hesitant to adopt that method for fear he would have to pay the expenses.

Claimant has lived alone for over a year and a half. He has a car and drives when he is not experiencing a severe pain episode.

After the respondent was directed to provide a list of three physicians the claimant selected Dr. Steven L. Hendler as his authorized treating physician. In his medical record dated June 24, 2003, Dr. Hendler commented on claimant's need for assistance at home:

Issue about assistance at home. He would need some assistance with homemaking and meal preparation but no personal care needs identified. He indicates intermittent assistant needs getting to the bathroom although from a physical standpoint I don't see why he needs this degree of assistance.²

In a medical record dated December 9, 2003, Dr. Hendler responded to the case manager's inquiry about claimant's home health care needs and noted that there was no change in his previous recommendations. At a later appointment on February 24, 2004, Dr. Hendler again discussed whether claimant needed home health care and commented that he did not see the need of additional home care other than heavy homemaking and lawn care.

Although Dr. Hendler recommended assistance with heavy homemaking, lawn care and meals that was the limit of his recommendations. He specifically testified that he did not recommend a home health aide, and that his recommendation was for a homemaker type person. He further noted that a home health aide would refer to someone going to the home and providing personal care assistance such as dressing, bathing and grooming. Finally, the doctor opined that light homemaking or housekeeping and meal preparation would not be medical care.

Dr. Hendler was aware that claimant reported he had periods where he perceived he was completely debilitated and completely unable to care for himself. On those occasions the doctor agreed claimant needed housekeeping assistance. Finally, Dr. Hendler's medical record dated August 30, 2004, indicated claimant was interested in working some with a psychologist, and that the case manager would set that up.

At the request of his attorney, the claimant was examined by Dr. Pedro A. Murati on October 18, 2004. After examining claimant Dr. Murati prepared a report detailing his impression of claimant's condition and made treatment recommendations. Among the treatment suggestions was a recommendation that claimant continue to take antidepressant medications and attend psychological counseling for his depression. It is significant to note that the treatment recommendations did not include any provision for

² Hendler Depo., Ex. 3 at 8.

home care. However at his deposition, Dr. Murati was questioned about the claimant's need for ancillary care and noted claimant would on occasion need such home care. Dr. Murati described such care as a housekeeper rather than a nurse. He testified:

Q. Doctor, with regard to counselor's questions about ancillary care, ancillary care really attempts to - - my understanding the way you've explained it is, it attempts to relieve the effects of the injury, correct? It doesn't really go directly towards the injury, but it relieves some of the effects of the injury. Is that what you're saying?

A. Well, let me give you an example of how usually I use ancillary care. You know, let's say I have a patient that had a stroke. He's discharged home from the hospital. Let's say that person can't cook or clean the house for himself. Then I will write an order usually - - I don't recall exactly who pays for this, Medicare or Medicaid, but, you know, there's home health care that goes to the house, you know, make sure the patient is clean, the apartment is clean, and they cook for him. Meals on Wheels is ancillary care. You know, they come to the home and provide a meal. That's what ancillary care is. It's care that is ordered by a physician, but not directly supervised by the physician.

Q. With respect to the type of care that you'd envision that he might need, what would you - - would you think he'd need an R.N. or L.P.N. or just perhaps a housekeeper?

A. No, he doesn't need a nurse per se. He needs a housekeeper, you know, and then again, when he is in such a condition because of either his physical condition or his mental condition that he's unable to take care of himself.³

K.S.A. 44-510h(a)(Furse 2000), requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury."

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has held that what may not constitute medical treatment in one context, may in another. For

³ Murati Depo. at 32-33.

example in *Hedrick*⁴, the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant's injury had resulted in paraplegia its holding might have been different. Accordingly, the determination of whether services constitute medical treatment is, at times, a case by case factual determination.

However, in the instant case the Board need not reach that determination since the respondent has already authorized the claimant's requested care. The claimant requested care for those times when his pain becomes debilitating. His case manager told him that when the need arises he should contact an ambulance for transport to the hospital emergency room. Consequently, the Board finds the requested care has already been provided/authorized and claimant should avail himself of the offered services.

Accordingly, for the foregoing reason, the Board affirms the ALJ's Post-Award Medical Award.

AWARD

WHEREFORE, it is the finding of the Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated February 21, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).